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International Company and Commercial Law Review

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Patricia Shineⁱ

The Pursuit of Certainty and Predictability on the Jurisdiction

Issue in Tortious Commercial Claims across Europe.

Introduction

The aim of establishing a full and consistent set of rules across Europe to settle the jurisdiction question in international commercial disputes, to apply to all contractual and tortious claims and replace national laws, remains an ambitious and ongoing project. In tortious commercial claims in general, and tortious claims for pure economic loss in particular, the Court of Justice of the European Union ('CJEU') has faced fundamentally problematic issues. There has been much academic discussion of the development of rules in this area, but the proliferation of such cases arising out of the financial crisis and the speed of change of practice in the financial markets, compared to the relative protracted process of the development of the law make the problems immediate and of real import for academics and practitioners engaged in international commercial disputes. It is therefore useful at this time to review how successful the European legislation has been so far in pursuing its own stated aims in this area in supplying suitable rules fit for application to the particular and varied circumstances of tortious commercial claims. Are the rules and principles which are emerging doing a good enough job of disposing efficiently with this preliminary issue to allow courts and practitioners to get on quickly and effectively with resolving the substantive issues, or at least a better job than the national rules which they have replaced, or should there be a reassessment of whether

instead some categories of tortious commercial claims require a distinct and particular approach, or even a separate set of rules entirely?

The legislation and its underlying aims and purposes

Jurisdiction in civil and commercial matters in Europe has been governed by the Brussels I Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("the Judgments Regulation")¹ and the preceding 1968 Brussels Convention.² The Judgments Regulation has been recast, ("the Brussels 1 Recast")³ which applies to claims brought after 10th January 2015. In the provisions relevant to this discussion, the Brussels I Recast has made no substantive changes to the terminology of the preceding provisions under the Judgments Regulation. These instruments are fundamental cores of the EU legislation which sets out to free up, simplify and make easier litigation across the EU, as part of the policy area of Justice, Freedom and Society.

Some key aims expressed within the legislation underlie and direct the decision making of the CJEU. First, paragraph 4 of the preamble to the Brussels I Recast highlights that the legislation is to unify conflicts rules and ensure rapid and simple enforcement of judgments.⁴ Paragraph 15 of the preamble to the Brussels I Recast states that the 'rules of jurisdiction should be highly predictable' and also that this predictability should be 'founded on the principle that jurisdiction is generally based on the defendant's domicile.....save in a few well- defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor.'⁵ Article 4 therefore states that subject to other Articles of the Regulation, 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member

¹ Regulation 44/2001 [2001] OJ L12/1.

² [1972] O.J. L304/36 later amended by further conventions on 9th October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland [1978] O.J. L304/1, on 25th October 1982 on the Accession of the Hellenic Republic [1982] O.J. L388/1, on 26th May, 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic [1989] O.J. L285/1 and 29th November, 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden [1997] O.J. C15/1.

³ Regulation 1215/2012 [2012] OJ L 351

⁴ Judgments Regulation preamble para 2.

⁵ Judgments Regulation preamble para 11.

State.⁶ The CJEU has shown in cases under the Judgments Regulation a clear intention to proceed in relation to any excepting grounds to Article 4 in those other Articles on the basis that to derogate from this principle requires explicit provision in the legislation, which is always to be interpreted narrowly. The provisions of the legislation are of course to be interpreted uniformly across jurisdictions.

The relevant exception for the purposes of claims based in tort is set out in Article 7 of the Brussels 1 Recast. Article 7(1)⁷ relates to contractual disputes and provides that a person domiciled in a Member State may be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question.

In matters of 'rights in tort, delict or quasi-delict tort', Article 7(2) of the Brussels 1 Recast states that a defendant may be sued 'in the courts for the place where the harmful event occurred or may occur.'⁸ The wording of this provision is not changed from the wording of the same provision in Article 5(3) of the Judgments Regulation, under which the previous cases discussed below have been decided.

It is this issue, arising from the wording of what is now Article 7(2) of the Brussels I Recast, of where in a tortious claim, and most problematically, in a claim for economic loss, the harm has occurred, which has proved complex and difficult. Cases coming before the CJEU and national courts continue to stumble on this preliminary issue.

Commercial claims for loss consequent on physical damage to property

The concept of 'harmful event' in Article 7(2) is not particularised in the way that 'place of performance' is particularised for contractual claims in Article 7(1), and that particularisation has assisted the CJEU in determining jurisdiction under that provision.⁹

⁶ Judgments Regulation Article 2

⁷ Judgments Regulation Article 5(1)

⁸ Judgments Regulation Article 5(3)

⁹ Patricia Shine, 'The problem of place of performance in contract under the Brussels I Regulation: can one size fit all?' 22(1) ICCLR 20. (C-386/05) *Color Drack GmbH v Lexx International Vertriebs GmbH*, [2007] E.C.R. I-3699; [2007] I.L.Pr. 35. (C-381/08) *Car Trim GmbH v KeySafety Systems Srl* [2010] 2 All E.R. (Comm) 770.

In contrast to the narrower rule making, applicable to specific categories in the case law under the previous Article 5(1) of the Judgments Regulation, the approach of the European Court in interpreting and applying the previous Article 5(3) has been to formulate and express wider, more generalised principles to be applied in the same way across all of the broad spectrum of tortious claims which might arise. This has been a much more straightforward and less problematic task, and has worked most effectively, in cases where the loss sought is consequent on physical damage to easily identifiable property. Some of the earliest key cases where some elemental principles have been established and on which the reasoning in later cases has been based have been relatively straightforward cases of this type. Many of the difficulties that have arisen have been as a result of attempting to apply such generalised principles developed in these early cases to other categories of tort where the elements of the tort itself and the nature of the harm suffered are of an entirely different nature.

This can be seen from an example of such an early case of loss consequent on physical damage which has become a fundamental key decision in the jurisprudence of what is now Article 7(2) of the Brussels I Recast; the decision of the CJEU in *Handelskwekerij GJ Bier NV v SA Mines de Potasse d'Alsace SA*.¹⁰ The claim was brought by the owner of a nursery garden in Holland which was watered by the Rhine. Saline waste coming down the Rhine from the Defendant's mine in France damaged the claimant's seed beds. Where here was the place where the harmful event occurred? Was it where the wrongful act happened in France, or where the beds were damaged in Holland? The CJEU applied its purposive approach and in giving judgment emphasised in this case that the exception in Article 5(3) of the Judgments Regulation to the basic rule of domicile of defendant was introduced to recognise 'the existence, in certain clearly defined circumstances, of a particularly close connecting factor between a dispute and the court which may be called on to hear it, with a view to the efficacious conduct of the proceedings.'¹¹ This test, of finding a close

¹⁰*Handelskwekerij GJ Bier NV v SA Mines de Potasse d'Alsace SA* [1978] Q.B. 708; [1977] 3 W.L.R. 479; [1976] E.C.R. 1735; [1977] 1 C.M.L.R. 284; (1977) 121 S.J. 677; Times, December 6, 1976.

¹¹ *Ibid*, 11.

connecting factor, was the guiding factor behind the ruling here and has been important in the most recent cases. In *Bier*, the European Court reasoned that such a close connecting factor might exist to either the place of the event giving rise to the damage, here in France, and also to the place where the damage occurred, here in Holland. It was therefore not appropriate to opt for one rather than the other and 'place where the harmful event occurred' gave a claimant a choice between the two in all tortious claims. This, though not explicit in the Article itself, is now accepted as a fixed rule in these cases, and was clearly appropriate to the facts of this particular case.

Another such early case is *Réunion européenne SA v Spliethoff's Bevrachingskantoor BV*,¹² a claim which concerned a consignment of peaches which was sent by sea from Australia to Rotterdam, and then to France by road. The contract was by way of bills of lading and there was therefore no contractual relationship between the recipient and the actual carrier and so Article 5(3) of the Judgments Regulation applied. The peaches were found to be damaged on arrival as the refrigeration system on the part of the journey by sea had broken down. Where did 'the harmful event' occur?

The facts were not entirely straightforward in that it was not known at which exact point during the journey the peaches were ruined, if indeed it had happened at just one place or was a continuing process. The Court's ruling therefore applied the principle that 'the place where the harmful event occurred' in Article 5(3) could mean either the place where the damage occurred, that is, where the peaches could be seen to be damaged, or the place where the event giving rise to that damage occurred. In giving his preliminary opinion, the Advocate General also defined the relevant damage and refined Article 5(3) accordingly. The damage therefore becomes

"any harm to the property or person of the plaintiff, where it relates to the event giving rise to the damage to the exclusion of indirect, more remote damage or damage which is suffered by an indirect victim."¹³

¹²Case C-51/97 *Réunion européenne SA v Spliethoff's Bevrachingskantoor BV* [1998] E.C.R. I-6511; see also *Henderson v Jaouen* [2002] EWCA Civ 75, [2002] 1 W.L.R. 2971 (CA). AMT paras 23-25.

¹³ *Ibid*, at [48].

By slight evidential sleight of hand, the harm was here adjudged to be where the goods were delivered in Rotterdam, where it was first ascertained that the peaches were damaged, at the end of the transit. The decision was justified by the need for foreseeability and certainty, 'justified by reason relating to the sound administration of justice and the efficacious conduct of proceedings.'¹⁴

Even though the questions of the exact time and place of the event giving rise to the damage, and of where the damage occurred are fudged in *Reunion*, it was at least straightforward that it was the peaches which were damaged, as it was clear that it was the seed beds in *Bier*. The damage to the peaches and the land are the direct damage and any other damage must therefore be indirect. In such cases as these, to interpret Article 7(2) of the Brussels I Recast in future cases to allow a choice between place of damage and place of event giving rise to the damage, and to distinguish direct and indirect damage, represents a helpful and progressive development of the wording of the Article.

Problems continue to arise however, discussed below, as a result of attempting to cross apply such principles to all categories of tortious claim, simply because they are also tortious. It is a much more simple task to see where the physical effects of a release of toxic waste occur, then the economic effects of, say, a misleading prospectus. Dicey summarises the position to say that the place of damage 'connotes the place where the physical damage is done or the recoverable economic loss is actually suffered.'¹⁵ Clearly the latter is likely to prove more problematic to establish than the former.

Commercial claims for economic loss

In considering claims for pure economic loss, the CJEU has applied the principles developed in these and other earlier cases of loss consequent on damage to property, without recognising and allowing for key problematic differences in the nature of the cases. Previous academic discussion has questioned the underlying basis of the approach of

¹⁴ *Ibid*, at [36].

¹⁵ Dicey, Morris & Collins, *The Conflict of Laws*, 15th edn Sweet & Maxwell 2012 para 11-287.

European law in this area, particularly in relation to claims arising out of the financial sector and asked whether, instead, more helpful principles could be drawn from specialised areas of financial law, given the difficulties with locating place of harmful event inherent in cases for pure economic loss. A counter argument would be that to attempt such a change would leave too much uncertainty, so that the formulation in the Brussels I Recast remains preferable, since 'even such an abstract concept may be preferable to having no rule at all.' The development of law in this area could instead proceed so that the abstract concepts within Article 5(3) are 'supplemented by more refined and precise rules that allow its application to pure economic loss.'¹⁶

A fundamental problem in claims for pure economic loss lies in identifying the exact nature, and then the location, of the damage suffered in tortious claims. In all tortious claims, loss is quantified in financial terms, for example, the cost of a consignment of damaged peaches, but where the claim is for pure economic loss, there is a danger of the issues of damage and loss becoming conflated and difficult to separate. The asset or property damaged can only be the financial assets of the claimant, so what is it that has been harmed, damaged or lost to found a claim for economic loss? Is it one particular financial asset? Is it one bank account? Or is it simply the claimant's net worth, sometimes described as his patrimony,¹⁷ which has been damaged?

Direct and indirect damage in cases of economic loss

The distinction between direct and indirect damage was applied in claims for economic loss in the 1990 judgment of the CJEU in the case of *Dumez France S.A. v Hessische Landesbank*¹⁸ and the 1996 case of *Marinari v Lloyds Bank Plc*.¹⁹ *Dumez* is thought of as having settled the simple point that simply, notionally, suffering damage in the form of economic loss at a claimant's place of business, will not, of itself, establish jurisdiction for

¹⁶ Matthias Lehman, 'Where Does Economic Loss Occur?' [2011] 7(3) JPIL 527, 542.

¹⁷ Matthias Lehman, 'Where Does Economic Loss Occur?' [2011] 7(3) JPIL 527.

¹⁸ Case C-220/88 *Dumez France S.A. v Hessische Landesbank* [1990] E.C.R. I-49; [1990] I.L.Pr. 299

¹⁹ Case C-364/93 *Marinari v Lloyds Bank Plc* [1996] Q.B. 217; [1996] 2 W.L.R. 159; [1995] E.C.R. I-2719; [1996] 5 Bank. L.R. 84; [1996] All E.R. (E.C.) 84; [1996] C.E.C. 14; [1995] I.L.Pr. 737; Times, October 19, 1995

that place of business under Article 5(3), particularly if the harmful event was committed away from that place of business. Dumez concerned French companies which formed German subsidiaries to carry out a property transaction in Germany. The action was brought by two French companies against the funders, German banks, for losses suffered as a result of the banks' decision to terminate the credit agreements, and was brought at the place of the claimant's registered office in Paris. The European Court held that simply because the claimant alleged that they had suffered their loss at their registered office, that could not found jurisdiction under Article 5(3). The direct harmful effect of the cancellation of the loans by the German banks was to the German subsidiaries which therefore took place in Germany, and the Plaintiffs were only indirect victims.

In *Marinari* the ECJ had held that Article 5(3) did not allow proceedings to be brought in the claimant's domicile in Italy, based on economic loss which he suffered there, due to conduct of employees of Lloyds Bank in England, which resulted in his arrest and seizure of his property in England. The latter was the initial damage and the former only the damage consequential on that initial damage. This distinction between immediate and consequential damage has been used in the most recent cases at the CJEU to pinpoint place of damage under Article 5(3) of the Judgments Regulation and *Bier*.

Commercial claims for economic loss: recent judgments of the CJEU

This issue was central to the recent judgment of the CJEU in the case of *Harald Kolassa v Barclays Bank plc*,²⁰ a claim which arose out of complex cross border financial dealings and was a reference from the Austrian courts. Mr Kolassa is domiciled in Vienna and at his request, his bank in Austria, *Direktanlage.at* placed an order with its parent company, *DAB Bank AG* based in Germany for bearer bonds issued by *Barclays Bank plc* in London. *Direktanlage.at* held the shares and Mr Kolassa had an interest in them. Barclays issued a prospectus at the time of issue of the bonds which was also distributed in Austria. The

²⁰ (C-375/13) *Harald Kolassa v Barclays Bank plc* [2015] C.E.C. 753; [2015] I.L.Pr. 14.

value of the bond was dependent on an index linked with a portfolio of funds. The portfolio was managed by a third party, to whom Barclays invested the monies raised on the issue of the bonds. Mr Kolassa's loss came about due to alleged fraudulent activity in the investment portfolio, since the entirety of the money had been lost and the valuation of the bonds at the time of the case was EUR.0. Clearly Mr Kolassa had no contractual relationship with Barclays, since he purchased the bonds in the secondary market from Direktanlage, but his claim for recovery of his pure economic loss against Barclays included claims both under the bond documentation and tortious claims.

That left Mr Kolassa to argue that his claims against Barclays based on the prospectus relating to the issue of the bonds and breach of other of their legal obligations came within Article 5(3) of the Judgments Regulation and that the place where the harmful event occurred or may occur was the jurisdiction in which he was domiciled as that was where he suffered his loss. Specifically, the third question before the court asked whether, when a security is purchased on the basis of deliberately misleading information, 'the place where the harmful event occurred or may occur' in Article 5(3) of the Judgments Regulation may mean 'the place where the damage occurred' which 'is taken to be the domicile of the person suffering the loss, being the place where his assets are concentrated?' This might be so if a court accepted that the damage, not just the loss, was to Mr Kolassa's financial assets generally, if these were located in his domicile.

In complex commercial cases such as this, place of event giving rise to the damage or place of damage cannot be considered, and the principles from the earlier more straightforward cases applied, until the court has first decided what it was that was damaged. In considering this in Kolassa, some questions that seemed likely to be within the consideration of the court might include, what was the connection between the place where the harmful event did/may occur and the place of damage, is it sufficient to simply see a diminution in overall assets and if so does this occur where the claimant's assets are concentrated even though this would be likely to be his domicile, not the defendant's, or is it necessary to establish an identifiable connected loss in a specific location?

The judgment given in Kolassa stated that it relied on general principles set out in two recent decisions of the CJEU, *Coty Germany GmbH v First Note Perfumes NV*,²¹ in which judgment was given in June 2014 and which was not a case for pure economic loss or arising from the financial sector, and *Kronhofer v Maier*,²² a decision from 2004, which was both.

Although both Kolassa and Coty involved claims brought in tort, many more differences than similarities exist between the two cases, both on the facts and in the key elements of the torts. The claimant in Coty produced and distributed cosmetic products, in particular a perfume in a distinctive bottle, and was based in Germany. The defendant, a wholesaler based in Belgium, was a perfume wholesaler. The defendant sold one of the claimant's products to a 3rd party based in Germany, delivered in Belgium but sold on by the 3rd party in Germany. If Article 5(3) of the Judgments Regulation was to determine jurisdiction, where did the harmful event occur? At least in this case, the property or rights damaged, though not physical, were easily identified as the intellectual property rights of the claimant, and therefore separable from the loss suffered. Coty applied the principle that Article 5(3) is intended to cover both the place where the damage occurred and the place of the event giving rise to it, to allow the claimant to sue in its home State, Germany.

The second key case relied on in Kolassa on this issue was the 2004 decision of the CJEU in *Kronhofer*, a case which had much more similarity to Mr Kolassa's, but was much more straightforward for the Court to decide. Mr Kronhofer, domiciled in Austria and wishing to sue there, brought his claim against investment consultants and the company by whom they were employed, all of which were domiciled in Germany. Mr Kronhofer alleged that the individual defendants had persuaded him to enter into a share call option for high risk shares on the London Stock Exchange, but breached their duty to advise him of the possible risks. Mr Kronhofer's loss was identified as the loss of the sum which he transferred to the defendant company, from Austria, to Germany, but was this an asset

²¹ Case C- 360/12 *Coty Germany GmbH v First Note Perfumes NV* [2014] Bus. L.R. 1294; [2015] C.E.C. 511; [2014] E.T.M.R. 49; [2015] I.L.Pr. 13

²² Case -C168/02) *Kronhofer v Maier* [2004] 2 All E.R. (Comm) 759; [2005] 1 Lloyd's Rep. 284; [2004] E.C.R. I-6009; [2004] All E.R. (EC) 939; [2004] I.L.Pr. 27

which it could be shown had been damaged? The question referred in this case was put widely, and a negative response seemed inevitable. The court was asked whether, in a case of pure economic loss arising out of the investment of a claimant's assets, the place where the harmful event occurred is to be construed so that 'it also encompasses in any event the place where the injured party is domiciled if the investment was made in another Member State of the Community?'

The reference from the Austrian court made clear that in its view in this case both the place where the damage occurred and the place of the event giving rise to it were in Germany. Mr Kronhofer was seeking to establish that Article 5(3) of the Judgments Regulation could apply to his place of domicile even in such circumstances. Given the strong presumptions against derogation from Article 2 of the Judgments Regulation, now Article 4 of the Brussels I Recast, and in particular against the domicile of the claimant and the need identified by the European Court to find a particularly close connecting factor between the facts of the dispute and the courts of jurisdiction, Mr Kronhofer's case was doomed to failure. His loss was in his home State but not any asset which he could point to as having been damaged, at least not on the reasoning of the European Court.

The simplicity of the decision in Kronhofer belies the difficulties inherent in applying previous case law of the European Court, from other different categories of tortious claim, to complex claims for pure economic loss, such as the case of Mr Kolassa. The claim in Kolassa was framed as a loss in the value of the certificates and damages for tortious claims arising out of assurances in the pre issue prospectus. To which assets in this case was the damage done, a question related to, but not the same as, what was the loss suffered? How then to pin both the place of the event giving rise to the damage and the place of the damage suffered to a geographical location in such a complex case as this?

The reasoning of the European Court in Kolassa is difficult because it discusses loss and damage as coterminous throughout the judgment. The Court's analysis therefore at this interlocutory stage of the events giving rise to the loss, as it was here termed, was that it could not be established that these happened within Mr Kolassa's domicile. The claim

related to alleged breaches by Barclays Bank of their duties arising out of the prospectus and information for investors, and in such a case of complex financial relationships, finding the place of harmful event, particularly at an interim hearing without full examination of the facts, will inevitably not be straight forward. All that the Court could conclude in this case at this stage was that there was nothing to show that the investment decisions of Barclays Bank, the decisions regarding the arrangements for the investments proposed and regarding the contents of the relevant prospectuses were taken in Mr Kolassa's domicile, or that the prospectuses were originally drafted and distributed anywhere other than where Barclays Bank had its seat.

The Court did hold however that the damage had occurred where Mr Kolassa suffered it, where he suffered loss in his own domicile 'when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.'²³ The judgment does not elaborate as to whether the damage, or loss, in this case constituted direct damage in the bank account and what such direct damage might need to constitute to avoid becoming indirect damage, drawing on the earlier case law. The court must have been inclined to find on these facts that if the issuer of securities does not comply, in issuing the prospectus, with his legal duties, and then allows the prospectus to be disseminated in other Member States, albeit not distributing it themselves, that issuer should be able to anticipate that investors in that other State might suffer loss in their own State.

So, Mr Kolassa was allowed to sue in his own domicile because his bank account was based there, after all the complexities inherent in a tortious claim of this kind. The ruling was expressed to be drawn from what might be described as some points of general principle drawn from *Coty*, *Kronhofer* and the cases on which they also relied, including *Bier* and *Reunion*, despite the wide disparity in the factual contexts and key elements of the torts in all these cases. This key case is now important for future cases, as can be seen from the analysis of decision making at the national level, below, and so the clarity of the

²³ *Kolassa*, (C-375/13) [2015] C.E.C. 753; [2015] I.L.Pr. 14, at [55]

guidance given is therefore important.

First, the Court restated that the Bier case, and the principle of choice between place of event giving rise to the damage and place of damage applies equally in cases for pure economic loss. As already discussed, this principle presupposes clarity on the issue of the nature of the damage, begs that prior question, and is far less helpful in such a complex commercial case as this. The reasoning in Bier, of the need to find a venue with a close linking factor with the dispute, for the sake of the sound administration of justice and the efficacious conduct of proceedings, and to find the court best placed for the trial (though of course not a forum conveniens analysis) was central again.²⁴ Unfortunately however, there is no analysis in the judgment of how these issues are addressed, so that its value as a guide for the future. There seems no discernible, overriding connection between Mr Kolassa's claim in this case and the facts of the dispute which will make the conduct of the proceedings more efficacious or the administration of justice more sound, in preference to the jurisdiction where the prospectus was issued, or the investments made. Or at least, there is no obvious discernible reason which would assist litigants in future commercial disputes to reliably predict the outcome of a jurisdiction dispute in their own case.

Finally, referring to the judgment in Kronhofer, the Court asserted that jurisdiction cannot found under Article 5(3) of the Judgments Regulation by reason *only* of the fact that a claimant has suffered financial damage there, but, by contrast in this case, this 'is justified if the applicant's domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred' and this *may* include the claimant's domicile as the place where the loss occurred, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of that court. This will support the objective of 'strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued.'

²⁴ *Kolassa*, (C-375/13) [2015] C.E.C. 753; [2015] I.L.Pr. 14, at [46]

This reasoning is in contrast to the statements in *Kronhofer*, that to extend jurisdiction to the location of a diminution in the assets of a claimant would be to introduce unacceptable uncertainty in analysing such issues as the place where the victim's assets are concentrated and would in fact run contrary to the principle of strengthening the legal protection of persons. The Court in *Kolassa* seems to be influenced more by its dislike of the way that Barclays have behaved, and their sympathy for the position of Mr Kolassa as a remote consumer. The court asserts that the issuer of a certificate in breach of his legal obligations regarding the prospectus must, 'when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer loss' although the relevance and effect of such an attribution of knowledge or belief is not explained. After all the academic and jurisprudential discussion in case law to date around nature and place of harm for economic loss, the issue was therefore decided by something as easy to manipulate as the location of a bank account. It is difficult to see how this leads to certainty of any kind, or the strengthening of the legal protection of the defendant in such a case.

These same issues have been addressed again by the CJEU in the most recent case of *Universal Music International Holding BV v Michael Tétéreault Schilling and Others*, a reference from the Supreme Court of the Netherlands in which judgment was given on 16th June 2016,²⁵ following the preliminary opinion of Advocate General Szpunar on 10th March 2016. The claimant is a part of the Universal group based in the United States but is itself established in the Netherlands. The claim arose out of the purchase by the claimant of music companies based in the Czech Republic. Mistakes by the lawyers in the drafting of the documentation for the acquisition led to an increase of the purchase price by a factor of 5 and the claimant now sues those lawyers in negligence to recover the difference between the sale price as intended and that actually paid after this had been settled in arbitration proceedings. Universal claims that it may sue in the Netherlands under Article

²⁵ Case C-12/15

5(3) of the Judgments Regulation, since it paid the settlement monies and the other costs associated with the arbitration in the Netherlands where it is based, and therefore that is where it has suffered damage under the principles set out in *Bier*, relying particularly on *Kolassa*. This reference was therefore an opportunity for the CJEU to reconsider the application of the earlier cases to claims for pure economic loss, and address some of the issues set out above.

The Dutch court had raised in particular that although *Marinari* had established that the place of financial damage which is indirect or consequent on other initial damage arising in another Member State cannot be the place where the harmful event occurred, yet the CJEU has not yet specified the criteria by which financial damage could be judged to be initial financial damage, or basic or direct financial damage, rather than financial damage which is the result of or consequent on the direct damage, that is, consequential or indirect damage. Neither had the court clarified criteria to establish where financial damage, whether direct or indirect, occurred or is deemed to have occurred. The question submitted by the referring court therefore asked whether Article 5(3) 'is to be interpreted so that the place where the harmful event occurred 'can be construed as being the place in a Member State where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of unlawful conduct which occurred in another Member State?' If the answer to this was yes, then the reference asked for further guidance as to how a court might make such an assessment, that is, what were the criteria which should be applied to assess the points which it had raised?'²⁶

The case was therefore well set up to provide answers which would address these issues. In his preliminary opinion, Attorney General Szpunar raised hopes that there might be a fundamental reassessment of the application of the principles developed in earlier cases, *Bier* in particular, to claims for pure economic loss. The answer to the first question submitted by the referring court was in his opinion, simply, 'I think not'²⁷ but he went on

²⁶ *Universal*, Case C-12/15 at [20]

²⁷ *Universal*, opinion of AG Szpunar, at [37]

to make comments of a more general nature on the questions referred.

The AG's emphasis in his opinion was again on the reasoning behind *Bier*, that of finding a venue with a close connecting factor to the dispute conduct of proceedings. He noted however that Article 5(3) of the Judgments Regulation makes no mention of the distinction as set out in *Bier* between place of damage and place of the causal event giving rise to the damage, or of the distinction in *Marinari* between direct and consequential damage.²⁸ In his view, where there is pure economic loss, the distinction between place of damage and place of event causing the damage is not helpful and does not in such cases assist in finding a venue close to the dispute. He would be 'wary of transposing to the letter the decision in [*Bier*]... to a situation in which the damage is financial.' The reason for that distinction in *Bier* 'lies in the necessity of staying as close as possible to the facts of the case and of designating the court best for settling the case and, in that context, of conducting proceedings efficiently, for example by taking evidence and hearing witnesses.'²⁹ The distinction in *Bier* did not assist with that aim in such cases as this, in which the factors pointed clearly to the Czech Republic, not The Netherlands.

It was not easy to distinguish *Kolassa*, and to do so the AG highlighted the fact in *Kolassa*, of a connection with a certain sum in a certain bank account, which set against the reasons behind and justification for Article 5(3) as set out by him, seems flimsy. His conclusion was that 'a general rule cannot be deduced from that case to the effect that financial damage suffices as a connecting factor for the purposes of that provision'³⁰ and '[i]n short, I cannot see how Article 5(3) of Regulation No 44/2001 can establish the jurisdiction of a court situated in a Member State with which the case is connected only by the fact that the person harmed has suffered financial damage there.'³¹ The remaining questions did not therefore need a reply.

There was some hope therefore that the CJEU in its judgment might reconsider the

²⁸ *Universal, opinion of AG Szpunar, at [30]*

²⁹ *Universal, opinion of AG Szpunar, at [39]*

³⁰ *Universal, opinion of AG Szpunar, at [45]*

³¹ *Universal, opinion of AG Szpunar, at [48]*

application of the previous cases to claims for economic loss in line with the points made in the preliminary opinion. The Court did not however take up these points, but instead persisted in an analysis which sought the place of event giving rise to the damage and the place where the damage occurred. The former, it reasoned, took place when the contract was negotiated and signed in the Czech Republic. The latter occurred when the matter was settled at the arbitration in the Czech Republic, though the payment came from an account in the Netherlands.³² An opportunity to re-examine this distinction has been therefore side stepped.

To distinguish *Kolassa*, the Court stated that '[t]hat finding is made within the specific context of the case which gave rise to that judgment, a distinctive feature of which was the existence of circumstances contributing to attributing jurisdiction to those courts.'³³ What these circumstances were however is not explained or enlarged upon, but therefore 'purely financial damage which occurs directly in the applicant's bank account cannot, in itself, be qualified as a 'relevant connecting factor', pursuant to Article 5(3) of Regulation No 44/2001.' Universal had the choice of payment out of several bank accounts, which had the Court decided differently, would have left the way open for forum shopping and therefore 'the place where that account is situated does not necessarily constitute a reliable connecting factor.'³⁴

The inclusion of 'not necessarily' in this statement leaves the issue open and the judgment, goes on to state that it 'is only where the other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place.'³⁵

The Court gives no explanation however as to of what such 'other circumstances' might

³² *Universal*, Case C-12/15 at [31]

³³ *Universal*, Case C-12/15 at [37]

³⁴ *Universal*, Case C-12/15 at [38]

³⁵ *Universal*, Case C-12/15 at [39]

consist.

The English national court

These issues are key to the ongoing dispute in the case of *AMT Futures Ltd v Marzillier, Dr Meier & Dr Gunter Rechtsanwaltsgesellschaft MbH*³⁶ in which a judgment was given in the Court of Appeal on 26th February 2015, which the claimants ('AMT') were, on 28th July 2015, granted leave to appeal to the Supreme Court. The Court of Appeal judgment was therefore given after the judgment of the CJEU in *Kolassa*, but before *Universal*.

AMT is a UK incorporated financial services company which acts as an execution only broker for dealings in derivatives, pursuant to contracts with its clients which include English law and English jurisdiction clauses, based on standard industry forms incorporating the Securities and Futures Authority terms. AMT's contracts have been carefully drafted with full legal advice to carefully delineate their responsibilities and the limits on the services to be provided. In particular, the terms were specifically drafted to avoid AMT becoming subject to proceedings abroad, and ensure that English law would apply, and AMT is not prepared to trade on any other basis. Despite its efforts in the contractual documentation, AMT has been sued in Germany by a significant number of its clients, to recover trading losses, bringing claims alleging fee churning with independent brokers. AMT alleges that this is an obvious case of forum shopping, the German jurisdiction being perceived as more investor friendly than the English.

The action in this English case is brought by AMT against the German lawyers in the German proceedings, claiming damages for the tort of wrongfully inducing breach of contract, in inducing AMT's clients to bring the proceedings in Germany, in breach of the jurisdiction clause. The defendants say that the English courts do not have jurisdiction to hear the claim, because if Article 5(3) of the Judgments Regulation is to govern, the proper jurisdiction for the hearing of these tortious claims is Germany. At first instance, the

³⁶ *AMT Futures Ltd v Marzillier, Dr Meier & Dr Gunter Rechtsanwaltsgesellschaft MbH* 2015] EWCA Civ 143; [2015] Q.B. 699; [2015] 3 W.L.R. 282; [2015] I.L.Pr. 20

defendants' application to stay the main proceedings on that basis was refused, the court considering that under Article 5(3), 'the place where the harmful event occurred' was England.³⁷

Such care had been taken to include English jurisdiction and governing law clauses in the relevant contracts, of which the German proceedings constituted such a clear breach. All three Judges in the Court of Appeal in this case agreed however that the proper place of jurisdiction under Article 5(3) of the Judgments Regulation is Germany, and all three expressed reluctance to do so given the circumstances of the case but felt regretfully that they were driven to it. In what seems a clear case of forum shopping, in order to frustrate contractual obligations, with a judgment expressed to be reluctant and regrettable, it might be hoped that the analysis which has led to such a conclusion should be at the least be clear, predictable and flow irresistibly and naturally from the previous European jurisprudence.

This case constitutes not only a claim for recovery of pure economic loss, arising out of dealings in the financial sector, but is also for a tort with its own inherent complexities, unlike any of the previous authorities in this area, which point was expressly noted by Clarke LJ in his judgment. Establishing the place where the damage occurred, with the *Marinari* distinction between direct and indirect damage, was particularly tortuous in this case. Clarke LJ, giving the main judgment of the Court, attempted to elucidate the distinction, describing direct harm as the 'jurisdictionally significant harm.' A court should be looking not just for where *any* harm has been suffered, but *the* harm. This terminology is familiar to English lawyers as arising in the English case law on the similar provision in Practice Direction 6B paragraph 3.1 of the English Civil Procedure Rules. There has been some judicial consideration of whether these two bodies of law should converge,³⁸ but this wording is not reflected in any of the authorities from the CJEU.

³⁷ *AMT Futures Ltd v Marzillier, Dr Meier & Dr Gunter Rechtsanwalts-gesellschaft MbH* [2014] EWHC 1085 (Comm); [2015] 2 W.L.R. 187; [2015] 1 All E.R. (Comm) 374; [2014] 2 Lloyd's Rep. 349; [2014] 1 C.L.C. 531; [2015] I.L.Pr. 18; [2014] C.T.L.C. 190; (2014) 158(19) S.J.L.B. 37

³⁸ For a consideration of whether these two bodies of law should converge, see the judgment of Gloster LJ in *Erste Group Bank AG, London Branch v JSC & ors* [2015] EWCA Civ 379

The difference between the decision at first instance and in the Court of Appeal in this case in the end turned on contrasting interpretations of the essential elements of the particular complexities of the tort in issue in this case, and therefore the nature of the damage and its location. At first instance, Popplewell J had identified the harm suffered as essentially the deprivation of a positive contractual right, the right to be sued, if at all, in the English courts. Clarke LJ considered his own previous decision in a case alleging the tort of inducing breach of contract in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* (The Swedish Club), accepted by both parties as properly decided.³⁹ The right infringed in *Dolphin*, induced by the defendant, was failure to comply with the obligation contractually to make payment in London, so that the court held that the harm was suffered in London, an altogether much more straightforward question. This was of course also where the claimant suffered its loss. By analogy, if the breach there was failure to pay, was the breach here failure to sue in England? Popplewell J had seen this as the 'primary function of the jurisdiction clause' particularly when accompanied by an English law clause, so that a party could expect that disputes would be heard in a jurisdiction which is familiar with the relevant law and most likely to be able to decide the issues. He found against the defendant's submissions that the benefit of which the claimant had been deprived was the right not to be sued in Germany, a negative obligation.

The decision at first instance was however overturned and *Dolphin* distinguished, since, it was explained, in *Dolphin* the failure to pay in England was the sole, direct and immediate cause of the loss which the claimant had suffered, namely the non receipt of the money. In the present case the harmful event was not failing to sue in England, it was suing in Germany. The harm suffered was the cost and expense of litigating in Germany and that is where the harm was suffered.

Unlike in *Kolassa*, there is at least a distinction made in this case between damage and loss by Clarke LJ in his judgment, and the two are not treated as coterminous. There is a search for the right or property which has been damaged, and this is not assumed to be

³⁹ *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm); [2010] 1 All E.R. (Comm) 473; [2009] 2 Lloyd's Rep. 123; [2009] 1 C.L.C. 460; [2009] I.L.Pr. 52

the same as the economic loss suffered. Clarke LJ acknowledged expressly in this case, quoting his own judgment in *Dolphin*, the 'danger of conflating the place where the damage occurred with the place where the loss was suffered',⁴⁰ which the English Court here took care to avoid, whereas in *Kolassa*, the European Court seemed to be treating loss and damage as one and the same.

It would be difficult to claim however that the judgment in this case proceeded easily or predictably. This was a complex set of facts, and a complex tort, very different to the tortious claims in the cases on which the judgment relied. Clarke LJ referred of course to the underlying need to find the venue to fit the claim, as set out in the previous cases. Although a *forum conveniens* argument is antithetical to the jurisprudence of the European Court and such an exercise is not appropriate, it is questionable whether that has been achieved, given the contractual position and the English Governing law clause. As to whether this decision advances the legal protection of parties, it is less than satisfactory that appeal judges at the national level are unanimous in stating that they have been driven to such a judgment, both regrettably and reluctantly.

Conclusion

To develop rules to determine jurisdiction across Europe encompassing the entirety of tortious claims is a big task, since the category of such claims is so broad and so disparate. The fact remains that applying the wording of Article 7(2) of the Brussels I Recast to all tortious claims, particularly those for economic loss, is likely to continue to be, at the least, an awkward and unsatisfactory exercise. The most recent cases show that the CJEU is persisting however in applying the same principles to all cases, without particularisation as to the elements of the tort in question or the legal context in which the claim arises.

The most basic expectation of the European legislation in this area must be that it works predictably and well for those engaged in international disputes, better than the national

⁴⁰ *AMT*, [2015] EWCA Civ 143; [2015] Q.B. 699; [2015] 3 W.L.R. 282; [2015] I.L.Pr. 20, at [36]

law which it replaces. The CJEU in its judgments has stated that it is guided by the objectives of the legislation which include certainty and predictability, and proximity to the dispute, and these aims mirror the entirely reasonable expectations of those engaged in the practice of law in this area, that the rules are certain enough to be serviceable, and appropriate to the eventual trial of the substantive issues. Neither of these two expectations is likely to be achieved unless the CJEU can better fit its rulings to the particular case in hand, whether by the kind of detailed rule making and categorisation of claims as has been done under the previous Article 5(1) of the Judgments Regulation, or by more overtly drawing guidance from other specialised areas of law, as appropriate to the particularities of the dispute in question.
